It is also the defendant's contention that the contract for sale of No. 91 Still Road, having been reduced to writing, the plaintiff cannot now be allowed to add to or vary the said contract and for this he relies on section 93 and proviso (d) of section 94 of the Evidence Act. Section 93 and the said proviso, in my view, make it fairly clear that any contract, being a contract which to be enforceable has to be in writing, cannot by virtue of the provisions of section 93 and proviso (d) of section 94 be varied by oral agreement.

This being so the only question for the court to decide is whether the reply by the said Development Control Branch as to the property being affected by a road widening line is a reply which can be construed to mean as being not satisfactory within the meaning of the said term 11. In this case, all the land comprising the front of the property up to the front of the porch is affected by the road line and could have been acquired by the government.

I accept the evidence of the defendant that he wanted to purchase a property which has a fair amount of land attached. In the instant case, according to the plaintiff, about 15.5% of the total area of land was affected by the road line. In these circumstances I consider that the government reply to the requisitions was not satisfactory and that the defendants are entitled to the refund of the 10% deposit, namely, $46,800.

The plaintiff's claim is therefore dismissed with costs. There will be judgment for the defendant on their counterclaim for $46,800 and interest thereon at 10% from 14 September 1984 to date and costs.

Order accordingly.

Solictors: *Rodyk & Davidson; Ann Tan & Associates.*

TAN SWEE ENG v. ASSOLAND PTE. LTD.

[A.C.J. (Thean J.) 23 April 1987]

[Singapore – District Court Appeal No. 20 of 1985]

Landlord and Tenant – Business premises – Sale of business by tenant – New owner granted "licence" – Whether tenancy or licence created – Principles applicable.

The plaintiffs acquired the premises in question in 1973 from one of their directors, Tan Kim Hin ("Tan"), but the legal title to the property was not transferred to them until 9 June 1981. At the time when the plaintiffs acquired the said premises, one Lim Joo Song ("Lim") was a tenant thereof, carrying on thereat the business of a grocery shop. In November 1976, Lim wanted to vacate the said premises and asked for consent from the plaintiffs to transfer his tenancy to another person. The plaintiffs refused to give such consent. However, they were prepared to allow another person to occupy the said premises on payment of an annual sum and on condition that when they required the same for redevelopment the occupier would vacate and deliver to them possession of the said premises. Lim then introduced the defendant to the plaintiffs and negotiation took place between the defendant and the plaintiffs' director, Ngo Soo Hing. Ngo said that it was agreed that she would take a licence of the said premises on a temporary basis and they both instructed a solicitor to prepare an agreement to give effect to that intention.

On 24 November 1976, two agreements were signed by the parties concerned. One agreement (the sale agreement) was made between Lim and the defendant whereby Lim agreed to sell to the defendant for a sum of $18,000 the business of a grocery shop then carried on by him at the said premises together with all the trade fixtures, implements, furniture and tables used in connection with the said business. The other agreement, expressed as a licence agreement, was made between Tan who was then the registered proprietor of the said premises and the defendant. By the licence agreement, Tan granted to the defendant "a licence for a period as stated in clause 2 of this agreement for the purpose of a grocery shop". Under clause 2, the "licence" was expressed to be for a indefinite period until such time as the plaintiffs required the said premises for redevelopment or renovation.

The consideration payable by the defendant under the agreement is $300 per annum payable in advance. There was contained in clause 7 the following provision:

"7: It is hereby agreed between the parties hereto that this agreement constitutes a licence and shall be in no way be construed or conferred a tenancy upon the licensee and that possession of the said shop premises is retained by the licensor subject however to the rights created by this licence agreement."

The sum of $18,000 was paid to Lim on the signing of the sale agreement and the defendant took over the business from Lim together with all things and articles purchased. The defendant was let into possession of the said premises and since then the defendant had been in possession of the said premises, carrying on thereof the business of a grocery shop. On 30 January 1981 the plaintiffs caused to be given to the defendant four months' notice terminating the "licence" and offering to pay, on an *ex gratia* basis, a sum of $5,000 as removal expense in terms of the licence agreement. The defendant refused to comply with the notice and the plaintiffs instituted the present proceedings against the defendant claiming for vacant possession of the said premises. The District Court allowed the plaintiffs' claim. The defendant appealed. The issue before the court was whether the agreement created a tenancy or a licence.

Held, allowing the appeal: (1) the relationship between the parties is determined by law and not by the label which they chose to put on it;

(2) the arrangement made with the defendant produced a contractual tenancy and moreover by virtue of the Control of Rent Act, on termination of the contractual tenancy, the defendant had become and was a statutory tenant and the plaintiffs have no ground for recovery of possession of the said premises;

(3) the order of the learned District Judge was set aside.

[*Editorial Note:* The terms "plaintiffs" and "defendant" used throughout in this report denote the respondents and the appellant respectively.]

Cases referred to:

(1) *Facchini* v. *Bryson* (1952) 1 T.L.R. 1386 (cited).
(2) *Addiscombe Garden Estates Ltd. & Anor.* v. *Crabbe & Anor.* [1958] 1 Q.B. 513 (consd).
(3) *Street* v. *Mountford* [1985] A.C. 809 (folld).
(4) *Re Tan Tye Deceased* [1966] 2 M.L.J. 107 (folld).
(5) *Abdul Rahim* v. *British and Malaya Trustees Ltd.* [1967] 1 M.L.J. 118 (folld).
(6) *Goh Gin Chye & Anor.* v. *Peck Teck Kian Realty Pte Ltd & Anor.* [1987] 2 M.L.J. 118 (folld).

DISTRICT COURT APPEAL.

Peter Chua for the appellant.

Joseph Tan for the respondents.

Cur. Adv. Vult.

Thean J.: This is an appeal from the judgment of the District Court allowing the claim by the plaintiffs for vacant possession of the premises known as 71, Upper East Coast Road, Singapore ("the said premises") on the ground that the defendant was a licensee of the said premises and the licence had been duly determined by a notice dated 30 January 1981.

The plaintiffs acquired the said premises in 1973 from one of their directors, Tan Kim Hin ("Tan"), but the legal title to the property was not transferred to them until 9 June 1981. At the time when the plaintiffs acquired the said premises, one Lim Joo Song ("Lim") was a tenant thereof, carrying on thereat the business of a grocery shop. In November 1976, Lim wanted to vacate the said premises and asked for consent from the plaintiffs to transfer his tenancy to another person. The plaintiffs refused to give such consent. However, they were prepared to allow another person to occupy the said premises on payment of an annual sum and on condition that when they required the same for redevelopment the occupier would vacate and deliver to them possession of the said premises. Lim then introduced the defendant to the plaintiffs and negotiation took place between the defendant and the plaintiffs' director, Ngo Soo Hiong (PW 1). PW 1 said that it was agreed that she would take a licence of the said premises on a temporary basis, and they both instructed a solicitor to prepare an agreement to give effect to that intention.

On 24 November 1976, two agreements were signed by the parties concerned. One agreement was made between Lim and the defendant ("the sale agreement") whereby Lim agreed to sell to the defendant for a sum of $18,000 the business of a grocery shop then carried on by him at the said premises together with all the trade fixtures, implements, furniture and tables used in connection with the said business. The other agreement, expressed as a licence agreement, was made between Tan, who was then the registered proprietor of the said premises, and the defendant ("the licence agreement"). By the licence agreement Tan granted to the defendant "a licence for a period as stated in clause 2 of this agreement for the purpose of a grocery shop." Under clause 2 the "licence" was expressed to be for an indefinite period until such time as the plaintiffs required the said premises for redevelopment or renovation. The consideration payable by the defendant under the agreement is $300 per annum payable in advance. There is contained in clause 7 the following provision:

"7. It is hereby agreed between the parties hereto that this agreement constitutes a licence and shall be in no way be construed or conferred a tenancy upon the licensee and that possession of the said shop premises is retained by the licensor subject however to the rights created by this licence agreement."

The other terms are, in substance, rather similar to those normally found in a tenancy agreement, except that the words, "licensor", "licensee" and "licence" were adopted in lieu of "landlord", "tenant" and "tenancy". The sum of $18,000 was paid to Lim on the signing of the sale agreement and the defendant took over the business from Lim together with all the things and articles purchased. The defendant was let into possession of the said premises, and since then the defendant has been in possession of the said premises, carrying on thereat the business of a grocery shop. On 30 January 1981, the plaintiffs caused to be given to the defendant four months' notice terminating the "licence" and offering to pay, on an *ex gratia* basis, a sum of $5,000 as removal expenses in terms of the licence agreement. The defendant refused to comply with the notice and the plaintiffs instituted the present proceedings against the defendant claiming for vacant possession of the said premises.

The defendant resisted the claim, contending that she was the tenant of the said premises; that

she took an assignment of the business carried on at the said premises and also the tenancy of the said premises, and that the licence agreement was, in fact and in law, a tenancy agreement. She claimed that the said premises were premises within the Control of Rent Act and claimed the protection of the Act.

It is common ground that the premises are premises within the meaning of the Control of Rent Act and the only issue before the District Court was whether the defendant was a tenant or a licensee of the said premises. If a tenancy was created then the claim of the plaintiffs would fail, as there were no grounds for making an order for recovery of possession against the defendant. The learned District Judge held that only a licence was granted to the defendant; in particular, he found (i) that the defendant understood the terms and conditions of the licence agreement and that she knew that the plaintiffs were not prepared to grant her a tenancy of the said premises and (ii) that she had agreed to accept a licence only. He concluded his findings as follows:

"The land had been purchased by the plaintiffs for purposes of development. When the existing tenant was about to quit, they did not want to develop the land just then because of the unsatisfactory market situation. Because they felt that the premises should not be left vacant they were prepared to allow it to be occupied by someone who could look after the premises for them. They, however, did not want to have to encounter difficulties in evicting the occupier when they were ready to develop. Under these circumstances they accordingly felt that a tenancy should not be given. To ensure that the incoming occupier would not have any misconception of her rights, they got a lawyer to draft an agreement spelling out the conditions under which the occupier would be occupying the premises and the terms and conditions were fully explained by the lawyer. The defendant had agreed to all of the terms and conditions."

It is clear that the parties professed in the licence agreement to create a "licence" of the said premises, and so far as the plaintiffs are concerned, they did not intend to grant, or cause to be granted, anything other than a licence of the said premises to the defendant and they believed that only a licence was created. That notwithstanding, the question still is what effect the law attaches to such an agreement in the circumstances of the case. The relationship between the parties is determined by law and not by the label which they choose to put on it: see *Facchini* v. *Bryson*[1] at p. 1389. In that case, an employer let his employee into occupation of a house in consequence of his employment at weekly sums payable by the latter. The house was not let for the better performance of his duty and the employee was therefore not a service occupier. The agreement expressly stipulated the following term: "nothing in this agreement shall be construed to create a tenancy between the employer and the assistant". Notwithstanding such an express term, the Court of Appeal in England held that a tenancy was created. Denning L.J. (as he then was) said at pp. 1389-1390:

"In all the cases where an occupier has been held to be a licensee there has been something in the circumstances, such as a family arrangement, an act of friendship or generosity, or such like, to negative any intention to create a tenancy. In such circumstances it would be obviously unjust to saddle the owner with a tenancy, with all the momentous consequences that that entails nowadays, when there was no intention to create a tenancy at all. In the present case, however, there are no special circumstances. It is a simple case where the employer lets a man into occupation of a house in consequence of his employment at a weekly sum payable by him. The occupation has all the features of a service tenancy, and the parties cannot by the mere words of their contract turn it into something else. Their relationship is determined by the law and not by the label which they choose to put on it: *Commissioners of Customs and Excise* v. *Pools Finance* [1952] 1 T.L.R. 797. It is not necessary to go so far as to find the document a sham. It is simply a matter of finding the true relationship of the parties. It is most important that we should adhere to this principle, or else we might find all landlords granting licences and not tenancies, and we should make a hole in the Rent Acts through which could be driven – I will not in these days say a coach and four – but an articulated vehicle."

Again in *Addiscombe Garden Estates Ltd. and Anor.* v. *Crabbe and Ors.*,[2] the plaintiffs expressly by a written agreement purported to "license and authorize" the defendants to use and enjoy certain premises and amenities therein for a term of two years in consideration of payment of certain "fees". The Court of Appeal in England, on a detailed examination of the agreement, came to the conclusion that a tenancy was created. Jenkins L. J. said at p. 522:

"As to the first question – whether the so-called licence of 12 April 1954 in fact amounted to a tenancy agreement under which the premises were let to the trustees – the principles applicable in resolving a question of this sort are, I apprehend, these. It does not necessarily follow that a document described as a licence is, merely on that account, to be regarded as amounting only to a licence in law. The whole of the document must be looked at; and if, after it has been examined, the right conclusion appears to be that, whatever label may have been attached to it, it in fact conferred and imposed on the grantee in substance the rights and obligations of a tenant, and on the grantor in substance the rights and obligations of a landlord, then it must be given the appropriate effect, that is to say, it must be treated as a tenancy agreement as distinct from a mere licence."

Jenkins L. J. also made a similar statement of law that the relationship of the parties was one determined by law. He said at p. 528:

"The present case, of course, has nothing to do with the Rent Acts, but the important statement of principle is that the relationship is determined by the law, and not by the label which parties choose to put on it, and that it is not necessary to go so far as to find the document a sham. It is simply a matter of ascertaining the true relationship of the parties."

The leading authority on the point is the decision of the House of Lords in *Street* v. *Mountford.*[3] There, Mr. Street by an agreement in writing granted to Mrs. Mountford a right to occupy furnished rooms in a residential house at a licence fee and subject to certain terms and conditions provided therein. The agreement expressly stated that the right of occupation was a personal licence and was not assignable and that the licence was terminable on 14 days' written notice by either party. Further, one of the terms expressly agreed upon by Mrs. Mountford was as follows:

"I understand and accept that a licence in the above form does not and is not intended to give me a tenancy protected under the Rent Act."

Pursuant to the agreement, Mrs. Mountford was let into exclusive possession of the rooms, and the issue before the court was whether she was a licensee or a tenant. The Court of Appeal in England held that she was a licensee but on appeal the decision was reversed; the House of Lords held that she was a tenant. Lord Templeman said at p. 819:

"In the present case, the agreement dated 7 March 1983 professed an intention by both parties to create a licence and their belief that they had in fact created a licence. It was submitted on behalf of Mr. Street that the court cannot in these circumstances decide that the agreement created a tenancy without interfering with the freedom of contract enjoyed by both parties. My Lords, Mr. Street enjoyed freedom to offer Mrs. Mountford the right to occupy the rooms comprised in the agreement on such lawful terms as Mr. Street pleased. Mrs. Mountford enjoyed freedom to negotiate with Mr. Street to obtain different terms. Both parties enjoyed freedom to contract or not to contract and both parties exercised that freedom by contracting on the terms set forth in the written agreement and on no other terms. But the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade."

It was submitted on behalf of the plaintiffs that *Street* v. *Mountford*[3] was merely persuasive and was not binding on me and that I should follow the decisions of our Court of Appeal in the two cases: *Re Tan Tye Deceased*[4] and *Abdul Rahim* v. *British And Malaya Trustees Ltd.*[5] That proposition I would accept, if the decision in *Street* v. *Mountford*[3] is in conflict with the two cases decided by the Court of Appeal here. However, on examination of the two cases I find nothing decided therein which is inconsistent with *Street* v. *Mountford.*[3] In *Re Tan Tye Deceased*[4] the trustees of an estate, who held the land Gay World Amusement Park, had no power to grant any lease; they proceeded by an agreement to grant a licence to an occupier to use a part of the land. Buttrose J., who heard the case, held that only a licence personal to the occupier was granted, and his decision was upheld by the Court of Appeal. Winslow J. in his judgment, with whom Tan Ah Tah F.J. and Chua J. concurred, affirmed the following statement of law at p. 109:

"It is also established law that the relationship between the parties is determined by the law and not by the label which parties to a contract choose to put on it. This proposition is borne out in Lord Justice Denning's judgment in *Facchini* v. *Bryson.*"

His conclusion that only a licence, and not a tenancy, was created was based on the following: (i) that no exclusive possession of the site was given to the occupier, as the control and supervision thereof remained vested with the trustees, (ii) that there were provisions in the agreement which indicated that a lease was never intended, and (iii) that the occupier's right to collect an admission fee was not *a profit a prendre* and no interest in the land was granted. Clearly, the absence of exclusive possession was an important consideration in his judgment. He said at p. 110:

"I find, therefore, that the agreement does not confer any licence to a *profit a prendre* on the licensee. It should be noted that even a licence to a *profit a prendre* may not necessarily give the licensee exclusive possession of the land. It is only if he does get such exclusive possession that any question of the licence being construed to be a lease will arise. In the circumstances of the present case both factors are missing, *i.e.* no profit of the nature of a *profit a prendre* is conferred on the licensee and, as I have found earlier, no exclusive possession of the said land and premises has been conferred on the licensee."

The case of *Abdul Rahim* v. *British And Malaya Trustees Ltd.*[5] illustrates once again that mere words or provisions in an agreement cannot turn a licence into a tenancy, and vice versa. There, by an agreement in a printed form,

the owner granted to the occupiers the use of a space in a common passage of a building called The Arcade on a "monthly tenancy" at a "rent" of $40 per month. Winslow J. held that notwithstanding the express tenancy agreement in the printed form only a contractual licence terminable by one month's notice had been created. He arrived at this conclusion on the following grounds. First, he held that the intention of the parties must be sought not only from the mere words of the contract but the substance thereof and the conduct of the parties. Secondly, he found (i) that the space "let out" was not adequately demarcated with precision, (ii) that the control of the entire Arcade was at all times vested in the owner and the occupiers had no exclusive possession of the space "let out" to them, and (iii) that the "rent" included "an element for the use of electric power" supplied by the owner. On appeal, the Court of Appeal affirmed his decision that the agreement did not create a tenancy but a contractual licence terminable by one month's notice. Chua J said at p. 119:

"It is clear from the authorities that in determining whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee, the intention of the parties is the paramount consideration. The intention of the parties must be sought not from the mere words of the agreement but from its substance and from the conduct of the parties and the surrounding circumstances."

Recently, the Court of Appeal here in *Goh Gin Chye and Anor.* v. *Peck Teck Kian Realty Pte. Ltd. and Anor.*[6] considered the English cases quoted above and the case of *Abdul Rahim*[5] and arrived at the following conclusion:

"First, the intention of the parties is an important consideration in determining the relationship of landlord and tenant, as in all other contractual relationships, but in every case the intention 'must be sought not from the mere words of the agreement but from its substance and from the conduct of the parties and the surrounding circumstances.' What the parties said or professed in the agreement alone is not enough; it does not alter what is, in effect, a tenancy into a licence, and vice versa. Secondly, the relationship of the parties is determined by law, having regard to all the relevant circumstances, and not by the label they choose to put on the agreement...

Thirdly, a material circumstance in the consideration of the relationship of landlord and tenant is exclusive possession of the property enjoyed by the occupier, and exclusive possession is an essential requirement of a tenancy...

Lastly, exclusive possession is also not the sole and only criterion; there may be circumstances negativing an intention to create a tenancy."

I now turn to examine the facts and consider what effect in law the licence agreement has. The defendant made two agreements concurrently or almost concurrently at the material time: one was the sale agreement, whereby she bought and took over from Lim the business of a grocery shop, which was carried on at the said premises together with all the trade fixtures, implements and furniture and she paid a sum of $18,000 therefor, and the other was the licence agreement, whereby she was let into exclusive possession of the said premises for an indefinite term paying therefor an annual sum, albeit a paltry sum of $300. Since then, she had been carrying on the business at the said premises. In fact, she had carried on the business there for slightly more than 4 years before she received the notice from the solicitors for the plaintiffs demanding vacant possession of the said premises. Though the licence agreement states that possession of the said premises was to be retained by the plaintiffs, that was not the actual position. At all material times she had, and still has, exclusive possession of the said premises. Her occupation of the said premises has all the features of a tenancy. There is nothing in the circumstances (apart from the licence agreement) which negatives an intention to create the relationship of landlord and tenant. It is true that the plaintiffs only wanted to give to the defendant a temporary occupation of the said premises so that as and when they required the said premises for redevelopment they could have possession thereof. Unfortunately the arrangement they made with the defendant produced a contractual tenancy, and more unfortunately by virtue of the Control of Rent Act, on termination of the contractual tenancy, the defendant had become and is a statutory tenant, and the plaintiffs have no ground for recovery of possession of the said premises.

This appeal therefore must be allowed. I set aside the order of the learned District Judge and dismiss the claim of the plaintiffs. As for costs, I disallow costs of this appeal to the defendant as the argument before me was not advanced below; but the defendant should be entitled to costs of the proceedings before the learned District Judge. There will be the usual consequential order for the refund to the defendant of the amount deposited as security for costs of the plaintiffs.

Order accordingly.

Solicitors: *Peter Chua Sobaran & Partners; Joseph Tan & Associates.*